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No. 96-871

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OIL COMPANY,
Petitioner,

v.

BARKAT U. KHAN AND KHAN & ASSOCIATES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Business Roundtable respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for petitioner has been obtained, but the attorney for respondents has not agreed.

The Business Roundtable is an association of more than 200 chief executive officers of leading U.S. corporations, employing over 10 million people. The CEOs examine public policy issues that affect the economy and develop positions which seek to reflect sound economic and social principles.

The companies represented in the Roundtable are engaged in a wide variety of businesses. They face substantial competition from domestic and foreign rivals, and therefore have a critical interest in the standards that are applied to judge the legality of aggressive competition

in the marketplace. In addition, many of the companies sell consumer products through independent dealers and are concerned about per se rules that inhibit service and promotional programs which benefit their ultimate consumers.

This brief is filed in support of the petitioner, but does not focus on the particular facts of this case or its immediate outcome. The brief focuses instead on the historical evolution of the law of vertical restraints. It emphasizes that *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), is a relic of the past, which has been undercut in principle and in practice by more recent decisions of this Court and of other courts. It argues that final abandonment of *Albrecht* will make an important contribution to the orderly development of the law in this area.

In short, the discussion is intended to help the Court place the present case in a broader perspective. For these reasons, The Business Roundtable requests that the following brief in support of petitioner be accepted for filing.

Respectfully submitted,

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BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Business Roundtable is an association of more than 200 chief executive officers of leading U.S. corporations, employing over 10 million people. The CEOs examine public policy issues that affect the economy and develop positions which seek to reflect sound economic and social principles.

The companies represented in the Roundtable are engaged in a wide variety of businesses. They face substantial competition from domestic and foreign rivals, and therefore have a critical interest in the standards that are applied to judge the legality of aggressive competition in the marketplace. In addition, many of the companies sell

consumer products through independent dealers and are concerned about per se rules that inhibit service and promotional programs which benefit their ultimate consumers.

SUMMARY OF ARGUMENT

This case inevitably presents the question whether the much-criticized decision in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), should at long last be overruled. Section I of the Argument below will show that consideration of the first antitrust injury question necessarily collapses into an inquiry about the continuing validity of *Albrecht*.

Section II of the Argument summarizes the reasons why *Albrecht* should be overruled. The underlying rationales of the *Albrecht* holding have been repudiated by this Court in later decisions, and lower courts have repeatedly struggled to avoid its anti-consumer consequences. *Albrecht*'s per se prohibition against maximum vertical price agreements nevertheless continues to inhibit business conduct that is pro-competitive and pro-consumer.

Section III of the Argument shows that repudiation of *Albrecht* will make a positive contribution in the ongoing effort to rationalize the law of vertical restraints. Efforts to accommodate the ultimate implications of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), have long distorted the law in this area. This Court has substantially reduced the distortions in recent years, and candid acknowledgment that *Albrecht* was wrong will be a significant further contribution.

ARGUMENT

I. THE ANTITRUST INJURY ISSUE HERE CANNOT BE SEPARATED FROM THE SUBSTANTIVE ISSUE.

The Roundtable agrees with petitioners and with the court below that respondents have not suffered antitrust injury under the principles announced in *Atlantic Rich-*

field Co. v. USA Petroleum Co., 495 U.S. 328 (1990), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Regardless of how the Court resolves the initial antitrust injury question,[1] however, this case squarely presents the issue whether *Albrecht*'s per se strictures against vertical maximum price fixing agreements should be retained. Indeed, in many respects, the analysis of antitrust injury collapses into the query about *Albrecht*'s continued vitality.

If the Court should hold, on the one hand, that respondents have made out a cognizable claim of antitrust injury on these facts, the continuing vitality of *Albrecht* is clearly presented for decision. Since respondents have proceeded on a per se theory, the Court's treatment of *Albrecht* becomes dispositive.

If, on the other hand, the Court should decide that respondents have not suffered antitrust injury, the ruling would inevitably raise the question of why vertical maximum price-fixing agreements are per se unlawful in the first instance. The Court has already decided that competitors bringing claims under the *Albrecht* rule lack antitrust injury unless they establish that the resulting prices are predatory. *Atlantic Richfield*, 495 U.S. 328. The

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[1] It is perhaps anomalous to consider the existence of antitrust injury before considering the substantive validity of the underlying claim. The antitrust injury requirement is not a substantive element of section 1 of the Sherman Act, 15 U.S.C. § 1, but springs from section 4 of the Clayton Act, 15 U.S.C. § 15, which confers a private right of action on persons claimed to be "injured in . . . [their] business or property by reason of anything forbidden by the antitrust laws." *Id.* at § 15(a); *see Atlantic Richfield*, 495 U.S. at 339, 342; *Brunswick Corp.*, 429 U.S. at 485. The purpose of the antitrust injury requirement is to ensure that the harm claimed by an antitrust plaintiff "corresponds to the rationale for finding a violation of the antitrust laws in the first place." *Atlantic Richfield*, 495 U.S. at 342. Therefore, in an ordered antitrust analysis, the antitrust injury inquiry occurs only after the existence of an underlying violation has been determined.

ultimate effect of *Atlantic Richfield* is to recast entirely the underlying cause of action. Even if a competitor proves the maximum resale price "agreement," it cannot recover damages without proof of a different cause of action for predatory pricing. But, predatory pricing issues are not determined by per se rules, *see, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and it therefore adds confusion to say that a competitor continues to have a per se claim under *Albrecht*.

Should the Court hold the dealers similarly lack antitrust injury—or suffer injury only under restricted hypothetical circumstances [2]—then the only persons left to qualify for broad per se treatment are ultimate consumers. But, here again, it is exceedingly difficult to understand how consumers will be injured in a way that justifies per se condemnation of a practice which is ordinarily designed to keep a dealer from increasing prices to them. Thus, a holding against dealer standing also undercuts the continuing utility of *Albrecht*.

II. *ALBRECHT* SHOULD BE OVERRULED BECAUSE ITS UNDERLYING RATIONALE IS NO LONGER ACCEPTED BY THIS COURT AND BECAUSE VERTICAL MAXIMUM PRICE-FIXING AGREEMENTS ARE NOT "MANIFESTLY ANTICOMPETITIVE."

Albrecht's per se prohibition of maximum vertical price fixing closely followed the Court's decision in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).[3]

[2] In *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 753-54 (1st Cir. 1994), the court applied the "controversial" *Albrecht* decision, but distinguished between the factual circumstances of dealers who might or might not have standing.

[3] In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), the Court confronted a maximum price-fixing agreement between a manufacturer and its subsidiary. *Id.* at 212. The Court treated the two entities as competitors and thus essentially analyzed the agreement as a horizontal arrangement. *Id.* at 213 (defining the agreement in question as "an agreement *among competitors* to fix maximum resale prices of their products" (emphasis added)). Subsequent cases have also treated *Kiefer-Stewart* as an application of the per se rule to horizontal maximum price-fixing arrangements. *Arizona v. Maricopa County Med cal Soc.*, 457 U.S. 332, 348 n.18 (1982). *Albrecht*, therefore, is this Court's only decision addressing the validity of purely vertical maximum resale price fixing.

Schwinn held all vertical nonprice restraints per se unlawful if the manufacturer parted with title to the goods sold. This sweeping per se prohibition on vertical distribution restraints rested largely on three concerns, first articulated in *Dr. Miles*: (1) the Court's belief that such agreements violated the "ancient rule against restraints on alienation," *id.* at 380; (2) the notion that dealers should be free to compete in the resale market as they see fit without undue interference from the manufacturer once title has passed; and (3) the notion that a system of vertical territorial agreements between a manufacturer and its dealers had the same economic effect as a horizontal territorial agreement among dealers and thus should be treated the same.

Albrecht was a logical extension of *Schwinn*. Once *Schwinn* declared virtually all vertical nonprice restraints per se unlawful, application of the same rule to vertical maximum price restraints naturally followed.[4] Vertical price agreements, whether they set minimum or maximum prices, can be conceptualized as a "restraint on alienation" and operate to restrain a dealer's freedom in the resale market just as a vertical territorial restraint does. Similarly, if you accept the premise that the economic effect of vertical and horizontal arrangements is the same,

[4] The *Dr. Miles* Court had previously placed minimum vertical price-fixing agreements, known as resale price maintenance, in the per se category.

logic dictates that vertical price fixing be treated the same way as horizontal price fixing—the classic example of an unlawful trade restraint, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

The premises underlying *Schwinn*, and thus *Albrecht*, were explicitly rejected in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), however. Additionally, doctrinal developments since *Sylvania*—including the emphasis on antitrust injury—have so eroded *Albrecht*'s foundations that the case exists only as an empty shell. As the Seventh Circuit's opinion in this case states, the decision "should be overruled." 93 F.3d 1358, 1363.

A. This Court Has Rejected The Notion That "Restraints On Alienation" And "Dealer Freedom" Justify A Per Se Rule In Vertical Restraints Cases.

When the *Sylvania* Court overruled *Schwinn*, it rejected the fundamental premises of that decision—namely, that per se rules in the vertical restraints arena properly rest on concerns about "restraints on alienation" and other alleged infringements of "the freedom of traders . . . to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951). Instead, the Court made plain that per se condemnation is reserved for those business practices that are "manifestly anticompetitive." *Sylvania*, 433 U.S. at 50. This stringent standard displaced *Schwinn*'s formalistic concerns with a clear focus on the economic effects of the practice in question. *Id.* at 58-59 ("[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing"). Under the *Sylvania* standard, categorical proscription of business behavior is appropriate only when the practice "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast*

Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 19-20 (1979).

The analytical significance of the shift from *Schwinn* to *Sylvania* cannot be overstated. One of *Sylvania*'s central insights is recognition that a decision to apply a per se rule itself reflects a judgment on the economic utility of all forms of a particular business practice. *Sylvania*, 433 U.S. at 50 n.16 ("Per se rules . . . require the Court to make broad generalizations about the social utility of particular commercial practices"). In deciding whether certain behavior should be categorically proscribed, ancient rules about "restraints on alienation" and rhetoric about "dealer freedom" simply do not answer the relevant questions.

Undoubtedly, all vertical agreements restrain intrabrand competition and in some cases, like the grant of an exclusive territory, completely eliminate it. But that fact alone says nothing about whether the elimination of certain types of rivalry increases output, improves services, or otherwise benefits consumers. Accordingly, when the Court overruled *Schwinn*, it held as a necessary corollary that vertical reductions of intrabrand competition were justifiable if they enhanced other forms of competition. *See id.* at 52 n.19 (drawing a distinction between interbrand and intrabrand competition and labeling the former "the primary concern of antitrust law"). Since *Albrecht* rests on the same premises as *Schwinn*, the *Sylvania* Court's repudiation of *Schwinn* jettisoned the underlying rationale for *Albrecht* as well.

B. The Court Has Also Rejected The Notion That The Economic Effects Of Vertical And Horizontal Agreements Are Identical And Require Equivalent Antitrust Treatment.

At the time it rendered its decisions in *Schwinn* and *Albrecht*, the Court still adhered to the view that vertical and horizontal agreements had equivalent economic effects and therefore warranted similar treatment under the anti-

trust laws. A series of purely vertical agreements between a manufacturer and its dealers was thought to reduce intraband competition in a manner similar to a horizontal agreement among dealers. Subsequent economic studies substantially undercut that view. Empirical and theoretical analyses demonstrated that vertical restraints can stimulate interbrand competition precisely because they suppress some of the most deleterious effects of unrestrained intrabrand competition, such as free riding, and encourage the provision of a wide range of promotional services to consumers. By drawing a distinction betwen interbrand and intrabrand competition, *Sylvania* gave legal expression to that learning, 433 U.S. at 54-57 (citing numerous economic articles identifying the potential pro-competitive benefits resulting from vertical nonprice restraints).

Since *Sylvania*, the Court has expressly made clear that there is no equivalence between the scope of the per se rule as it applies to certain horizontal restraints and as it applies or should apply to vertical agreements. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 734 (1988) (the "notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality was explicitly rejected in *GTE Sylvania*. . . ."). [5] For example, *Sylvania* requires that vertical territorial agreements be judged under the rule of reason, while horizontal ones are normally per se unlawful. *See, e.g., Palmer v. BRG of Ga.*, 498 U.S. 46 (1990). [6]

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[5] The distinction actually pre-dates *Sylvania*, in some areas. *Compare, e.g., United States v. Container Corp. of Am.*, 393 U.S. 333 (1969) (barring mere exchanges of price information at the horizontal level) *with Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964) (upholding the circulation of suggested resale prices to customers), *cert. dismissed*, 381 U.S. 125 (1965).

[6] This recognized distinction between horizontal and vertical agreements is the reason why the Court's decision in *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332 (1982), is not controlling.

Moreover, while retaining the per se rule against minimum resale price maintenance, the Court has carefully circumscribed the cases to which it is applicable so that the *Sylvania*'s application of the rule of reason to vertical nonprice restraints will not be circumvented by recharacterization of those practices as vertical price agreements. *See, e.g., Sharp*, 485 U.S. 717 (1988) (holding that agreement between manufacturer and one dealer to terminate a second dealer because of the second's discounting is subject to analysis under the rule of reason unless the manufacturer and remaining dealer also agree on resale prices or price levels).

In addition, the Court has been "solicitous to assure that the market-freeing effect of [its] decision in *GTE Sylvania* is not frustrated by related legal rules." *Id.* at 726. In *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), the Court articulated strict standards for inferring vertical price agreements from ambiguous evidence. Thus, both *Monsanto* and *Sharp* recognize that the scope of the per se rule in the vertical restraints arena should be "narrow," *Sharp*, 485 U.S. at 724, and calibrate the standards for the other elements of a Sherman Act violation in order to protect that fundamental principle.

Finally, the Court has circumscribed those situations in which private plaintiffs may recover treble damages for injuries allegedly flowing from maximum vertical price agreements. In *Atlantic Richfield*, the Court flatly prohibited any competitor from obtaining damages for a violation of the *Albrecht* rule in the absence of a showing that the agreed upon maximum price is predatory. The effect of this decision is to further gut the *Albrecht* rule. [7] By limiting the circumstances in which competitors may

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[7] The *Atlantic Richfield* decision acknowledges this point by noting that, for purposes of that decision, the Court simply "assume[d], *arguendo*, that *Albrecht* correctly held that vertical, maximum price-fixing is subject to the *per se* rule." 495 U.S. at 335 n.5.

recover for maximum vertical price agreements, the Court has effectively shifted the focus away from *Albrecht*'s per se strictures and placed upon the competitor the demanding burden of proving a conspiracy between a manufacturer and its dealer or dealers to price predatorily. Because predatory pricing schemes are rare and unlikely to succeed, *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986), the Court's holding in *Atlantic Richfield* is an implicit recognition that maximum vertical price agreements are unlikely to cause substantial competitive harm in many contexts.

C. Lower Courts Have Also Consistently Limited *Albrecht* In Order To Avoid The Anti-Consumer Consequences Of A Rigid Adherence To Its Per Se Prohibitions.

Faced with a decision based on logical premises which this Court has subsequently repudiated, the lower courts have repeatedly limited the reach of *Albrecht*'s per se rule by resort to alternative legal theories. Several courts have held, for example, that it is not vertical price fixing when a manufacturer and dealer agree that the dealer will pass on a promotional discount to consumers but do not agree on the underlying price level. *Lattice Semiconductor Corp. v. Interface Elec. Corp.*, 1994-2 Trade Cas. (CCH) ¶ 70,779 (9th Cir.); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984); *Lewis Serv. Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842 (8th Cir.), *cert. denied*, 467 U.S. 1226 (1983); *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983). Lower courts have also based their decisions on the plaintiff's failure to prove antitrust injury, *Jack Walters & Sons*, 737 F.2d at 708-09; lack of a causal link between the presumed injury to competition and plaintiff's alleged injury, *Northwest Publications, Inc. v. Crumb*, 752 F.2d 473 (9th Cir. 1985); or lack of an actual "agreement"

between the manufacturer and dealer, *Curry v. Steve's Franchise Co.*, 1985-2 Trade Cas. (CCH) ¶ 66,877 (D. Mass); *Martindell v. News Group Publications, Inc.*, 621 F. Supp. 672 (E.D.N.Y. 1985).

Even when lower courts have applied the *Albrecht* rule, they have recognized that the decision is difficult to reconcile with subsequent authority. In this action, for example, the court stated that *Albrecht* was "unsound *when decided*, and is inconsistent with later decisions by the Supreme Court." 93 F.3d at 1363 (emphasis added). Similarly, in *Caribe BMW, Inc. v. Bayerische Motoren Werke Akitengesellschaft*, 19 F.3d 745 (1st Cir. 1994), the First Circuit recognized that *Albrecht* is a "controversial case," outlawing "not only anticompetitive uses of maximum price fixing, but also procompetitive uses as well, namely, use of a maximum resale price agreement that protects consumers from the exercise of a retailer's monopoly power." *Id.* at 753 (citing 8 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1636 (1989)). *Caribe* is thus far from a ringing endorsement of the *Albrecht* rule, but rather stands for the proposition that—as long as *Albrecht* remains the law—lower courts will not be able to dispose of dealer claims of maximum vertical price fixing on antitrust injury grounds at the pleading stage.

D. Maximum Vertical Price Agreements, Like Vertical Nonprice Agreements, Can Have Substantial Procompetitive Effects.

Since the stated rationales for the *Albrecht* rule have passed into antitrust antiquity, the rule can survive only if it satisfies *Sylvania*'s "manifestly anticompetitive" standard. Accordingly, the Court should retain the *Albrecht* rule only if it can be said that, on their face, maximum vertical price agreements always or almost always reduce market output. *Cf. Broadcast Music, Inc.*, 441 U.S. at 19-20. It is plain that such agreements do not meet that standard.

The potential procompetitive effects of vertical nonprice restraints, which the Court recognized in *Sylvania*,

may also result from or be enhanced by maximum vertical price agreements. Exclusive dealer territories, for example, may be the most efficient mode for distribution of a manufacturer's product. Exclusive arrangements are not per se unlawful, but may result in localized monopolies or permit some dealers to exercise a degree of market power. Like any monopolist or seller with market power, the local dealer may raise prices and restrict output. This harms both consumers, who must pay higher prices for a product, and manufacturers, who make fewer sales. A maximum price agreement benefits both manufacturer and consumer by controlling any dealer's exercise of market power. *See* AREEDA, *supra*, ¶ 1636a.

It makes no sense to condemn out of hand a practice which is designed to *prevent* reductions in output and increased prices at the dealer level. Moreover, since the Court has recognized the efficiencies flowing from exclusive territorial arrangements, it also makes no sense to categorically prohibit ancillary and related practices that limit the possible adverse impact of the permitted distribution system.

Maximum price agreements can be pro-competitive and pro-consumer even when dealers are not given exclusive territories. Manufacturers frequently have special promotional programs to build market share or reduce inventory. This can be done with direct consumer coupons or rebates, or by relying on the dealer to pass through the benefits of the promotion to consumers. If the dealer instead pockets part of the benefits, the output-enhancing effect may be dampened—but efforts to prevent dealers from doing so can be attacked as violative of *Albrecht*.[8]

[8] There are further practical complexities when there are jointly financed promotions by manufacturers and dealers, and joint advertising of these promotions. As long as the *Albrecht* precedent stands, antitrust counselors have to focus on formalistic distinctions rather than practical effect.

The fundamental flaw in *Albrecht* is illuminated if you view vertical relationships as the purchase of services by the manufacturer rather than the purchase of goods by the retailer. It then becomes obvious, first, that vertical restrictions are highly unlikely to be in aid of horizontal ones, since a buyer (here the manufacturer) normally has no interest in facilitating a supplier cartel.

In addition, if you say that a manufacturer can never specify the maximum dealer margin, you are saying that a buyer can never put a limit on what it is willing to pay for services it buys. The fact that a dealer might like to sell an enhanced package of services, and even thinks it has customer demand for those services, does not mean it should be per se illegal for a manufacturer to decide it does not want to pay for that enhanced package.

The final irony is that the *Albrecht* rule does nothing to protect the very dealers for whom the opinion professes solicitude. To the extent that *Albrecht* inhibits manufacturers' efforts to protect their ultimate customers from exploitation, or to extend promotional benefits to them, it creates perverse incentives for manufacturers to integrate vertically into distribution to the detriment of dealers. AREEDA, *supra* ¶ 1635. This internal contradiction should be eliminated by abandonment of *Albrecht*'s per se rule.

E. The Possibility That Vertical Maximum Price Agreements Might, In Some Circumstances, Become Minimum Price Arrangements Does Not Justify Continued Application Of The Per Se Rule.

Although *Albrecht* expresses a fear that maximum vertical price agreements may be disguised minimum resale price maintenance arrangements, that possibility does not justify application of the per se rule under *Sylvania*'s "manifestly anticompetitive" standard. Since *Sylvania*, the Court has simply refused to find that the mere possibility an agreement might work competitive harm is sufficient to

make it categorically unlawful. Indeed, such a sweeping use of per se rules is precisely what *Sylvania* rejects.

Sylvania endorses the rule of reason as the standard mode of antitrust analysis and places the burden on those who would depart from it. *Sylvania*, 433 U.S. at 58-59. It does so because the rule of reason provides an opportunity to separate competitively beneficial or neutral practices from those that cause real consumer injury. Overruling *Albrecht*, therefore, does not shield vertical maximum price agreements from antitrust scrutiny but merely subjects them to the standard rule of reason review, which balances the competitive benefits of the practice against any harms.

Albrecht is a product of its times in a number of respects—some already mentioned. It is also important that the rule of reason had little substantive content when *Albrecht* was decided. Apart from the vague and generalized inquiry described in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918), the rule of reason provided no structured analytical framework for resolution of antitrust issues. At the time *Albrecht* was decided, adoption of the rule of reason in effect constituted a determination that the practice was lawful. Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 Geo. L.J. 305 (1987). The same cannot be said today.

Economic analysis in general and judicial facility with economic analysis in particular have given substantive content and precise focus to the rule of reason since *Sylvania*. *See, e.g., FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (applying rule of reason and declaring horizontal agreement among competitors unlawful); *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (applying rule of reason to declare agreement among competing colleges and universities to reduce the number of televised college football games unlawful). Both this Court and

the lower courts have developed "quick look" applications of the rule of reason, *e.g., Indiana Fed'n of Dentists; NCAA; National Society of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992), and applied "screening" devices, such as market power tests, to reduce the cost and burden of applying the rule of reason while retaining the benefits of rule of reason analysis, *e.g., Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 221 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1568-69 (11th Cir. 1983). These efforts have been reinforced by guidelines of governmental enforcement agencies that focus antitrust inquiries on relevant economic issues and provide a refined analytical structure. *See, e.g., Department of Justice and Federal Trade Commission Horizontal Merger Guidelines* (1992).

A rule of reason inquiry, therefore, is no longer formless and open-ended. Abolition of *Albrecht* does not mean that harmful vertical maximum price agreements will escape condemnation under the Sherman Act. Always is not the only alternative to never.

III. THE CONTINUING EFFORT TO BRING ECONOMIC RATIONALITY TO THE LAW OF VERTICAL RESTRAINTS WILL BE ADVANCED BY A CANDID RECOGNITION THAT *ALBRECHT* IS AN ANACHRONISM.

As suggested above, this Court no longer applies the underlying premises of the *Dr. Miles* decision. *Dr. Miles* was based on the medieval prohibition against restraints on alienation and the idea that vertical restraints are equivalent to horizontal restraints. Neither idea has been accepted since *Sylvania*. This Court can therefore simply

overrule *Albrecht* on the basis of existing, more recent precedent.[9]

It is, however, also useful to understand that final interment of *Albrecht* will make a positive contribution to the evolution of vertical restraints law. It was apparent, almost from the start, that the *Dr. Miles* principles would cause serious harm if pressed to their logical conclusion. Since the consequences of finding a vertical price "agreement" were unrelentingly severe under these principles, courts began to focus on the issue of whether there was an agreement rather than on the economic consequences of the practice. Thus, *United States v. Colgate & Co.*, 250 U.S. 300 (1919), upheld the right of a manufacturer to announce a resale pricing policy and refuse to do business with distributors who departed from it. The decision vindicated the basic right of suppliers to choose their customers, but it required some distortion of ordinary principles of contract law, which recognize "agreements" based on performance.

The Court then drastically narrowed the reach of the *Colgate* doctrine by finding that it did not apply if there was "affirmative action to achieve uniform adherence" to a manufacturer's resale price policy. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 47 (1960). This limitation was justified in part by the fact that the affirmative action included enforcement assistance from other dealers —*i.e.*, there were "agreements" with third parties. But, the Court also made the curious distinction between "voluntary acquiescence" by dealers, which is presumably benign, and a manufacturer's interference with the dealer's individual free choice. *Id.* at 46-47. In other words,

[9] It is possible to support the holding in *Dr. Miles*, and still argue that *Albrecht* is wrong. *See, e.g.*, Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 Geo. L.J. 1487, 1490 n.17 ("Maximum vertical price fixing . . . probably *should* be treated under a rule of reason.").

evidence of fundamental *disagreement* makes the situation worse.[10]

The same curious distinction is imbedded in the so-called "consignment" exception to *Dr. Miles*. In *United States v. General Elec. Co.*, 272 U.S. 476 (1926), the Court upheld a resale price maintenance plan by a seller who retained title to its products but consigned them to agents for resale. The later decision in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), distinguished *General Electric* in part on the ground that the defendant's widespread consignment arrangements involved pernicious "coercion" of dealers. Again, evidence of disagreement apparently made the illegal "agreement" worse.

The irony of the distinctions in these cases is more than purely semantic. Recall that *Dr. Miles* was based on the assumption that vertical price arrangements were equivalent to horizontal agreements among dealers, and there is a scholarly consensus among both defenders and critics of *Dr. Miles* that the principal potential problem with vertical price arrangements is the possibility that they may facilitate a dealer cartel.[11] Yet, under existing precedent, evidence that tends to *negate* the existence of a dealer cartel—*i.e.*, evidence that the restraint is manufacturer driven and contrary to dealer interests—is cited in aggravation rather than mitigation.

[10] This anomaly is responsible for the conventional wisdom among experienced corporate counselors that a *Colgate* resale price program is safe as long as 100 percent of the dealers are happy with it, and only becomes dangerous when mavericks emerge.

[11] *Compare* Pitofsky, *supra* note 9, at 1490-91 *with* ROBERT H. BORK, THE ANTITRUST PARADOX 292 (1978); *see also* Edward Meadows, *Bold Departures in Antitrust*, FORTUNE, Oct. 5, 1981, at 180, 182 (quoting William Baxter, the former Assistant Attorney General in charge of the Antitrust Division, as stating that "[a] vertical problem is either a horizontal problem in disguise or no problem at all").

The basic distinction between "price" and "nonprice" restraints also is based on the authority of *Dr. Miles*, rather than practical reality. In *Sylvania*, the Court for the first time applied sophisticated economic analysis to the law of vertical restraints. In a famous footnote, however, the Court expressly reaffirmed the use of per se analysis for vertical price restraints. *Sylvania*, 433 U.S. at 51 n.18. The distinction is artificial. All vertical restraints, if effective, will have an effect on price—and direct price restrictions are not necessarily the most severe. A dealer price restriction, for example, may blunt one aspect of intraband competition; an exclusive territory restriction may extinguish intrabrand competition altogether.

Faced with the dramatic consequences of a semantic distinction between "price" and "nonprice" vertical restrictions, lower courts have sometimes had to stretch hard to avoid placing price-related restrictions in the per se category. *See, e.g., Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883 (1st Cir.) (resale price restriction on sales outside dealer's designated area not illegal per se because territorial exclusivity could have accomplishd the same thing), *cert. denied*, 439 U.S. 833 (1978); *see also supra* at 10-11 (citing decisions in which courts are forced to draw formalistic lines in order to uphold the legality of manufacturer efforts to ensure that discounts to dealers are passed through to customers).

In short, the *Sylvania* case and its progeny have made a dramatic contribution to consumer welfare by liberating the competitive system from archaic doctrines that distorted the law of vertical restraints. But some legal anachronisms remain[12] because of the long shadow cast by the misguided and subsequently repudiated premises of *Dr. Miles*. The Court has been committed to progress by increments—and this brief does not urge another course—but it is important to recognize that there still are problems of internal coherence and consistency. This case provides the opportunity to reduce further the reach of those problems.

[12] Compare the continuing fiction that tying arrangements are per se illegal, although an extensive market analysis is necessary to trigger application of the rule. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

For the reasons stated, there is nothing of *Albrecht* that is worth preserving. This Court should flatly overrule *Albrecht* as part of its continuing effort to introduce economic reality into antitrust enforcement.

CONCLUSION

This Court should accept the overt invitation of the court below, and reverse.

Respectfully submitted,

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